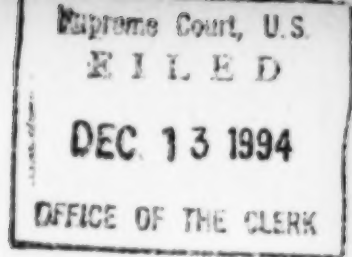


(10)
No. 94-3



**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1994 TERM**

Reynoldsville Casket Co., et al.,

Petitioners,

vs.

Carol Hyde,

Respondent.

**On Writ of Certiorari to the
Supreme Court of Ohio**

**Brief for the State of Ohio
as Amicus Curiae in Support of Respondent**

**LEE FISHER
Attorney General**

**RICHARD A. CORDRAY
State Solicitor
(Counsel of Record)**

**SIMON B. KARAS
Deputy Chief Counsel
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-5026**

**COUNSEL FOR AMICUS CURIAE
STATE OF OHIO**

23 1994

QUESTION PRESENTED

Whether the Court's decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), should be applied retroactively to bar civil cases that had already been filed and were pending at the time that decision was announced.

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INTEREST OF THE AMICUS CURIAE

The State "has a manifest interest in providing effective means of redress for its residents" against tortfeasors who cause injury to them. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). In this case, the State of Ohio advanced this manifest interest by enacting a statute tolling the limitations period in specified circumstances. See Ohio Rev. Code §2305.15. Although the Court subsequently held that this tolling statute imposed an unconstitutional burden on out-of-state corporations under the Commerce Clause, see *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988), many Ohio citizens had relied upon it for decades in making difficult case-by-case determinations of exactly when would be the most advantageous moment to file a particular lawsuit.

The issue in this case is whether the Court's holding in *Bendix* should be applied retroactively to bar civil cases that had been filed and remained pending at the time that decision was announced. The State of Ohio respectfully submits that such retroactive application would defeat the legitimate reliance interests of Ohio citizens who had already sought redress against tortfeasors in the Ohio state courts before this Court issued its decision in *Bendix*. The amicus curiae and its citizens thus are directly affected by the ruling in this case.

Here, Respondent was injured in an automobile accident. She brought suit in state court against Petitioner Reynoldsville Casket Company and one of its employees. The timing of her lawsuit was proper in view of the tolling statute in effect at the time; if that statute had not existed, she may well have chosen to bring her suit earlier to avoid any limitations problem. Choices such as those, about whether and when to file a particular lawsuit, are often

dependent on many distinct factors, including the nature and extent of the plaintiff's injuries, their subsequent recurrence or deterioration, investigation of the facts of the incident, ascertainment of proper defendants, identification of possible witnesses, difficulties in securing counsel, and the ability of the plaintiff to secure financial relief through other channels such as various forms of collateral benefits. The important point here is that many potential plaintiffs rely on the prevailing understanding of the legal limitations period in deciding whether and when to file suit on the basis of an allegedly tortious incident. Any counsel consulted in such circumstances would responsibly provide legal advice on the very same grounds.

The "manifest interest" of the States in protecting their citizens is clearly present in tort cases:

"A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort."

Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984) (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974)). The State's interest is particularly strong when the plaintiff, as in this case, is a state resident.

This case thus implicates the authority of the State of Ohio to protect the vested reliance interests of its citizens by securing the forum in which its citizens had sought redress against wrongdoing in reliance upon the laws that were in effect at the time the lawsuit was filed. Accordingly, this

case directly affects the State's authority to enforce principles of the common law that have long served to create and protect an orderly society within the State. For these reasons, it is appropriate for the amicus curiae State of Ohio to present its views about why the legitimate reliance interests of its citizens should be recognized and respected by the Court in this case.

SUMMARY OF ARGUMENT

The court below properly concluded, though for different reasons than those presented here, that this Court's decision in *Bendix* should not be applied retroactively to bar this lawsuit, which had already been filed and was pending at the time the holding in *Bendix* was announced. As an initial matter, this Court explicitly concluded that it was unable to address and resolve the retroactivity issue in *Bendix*, on the ground that the issue had not been properly raised by the parties on the record before the Court. Accordingly, the legal issue of retroactivity should not be taken as having been implicitly decided in *Bendix*, where it plainly was not resolved, but should be determined in the first instance in this case.

Under the three-pronged test for determining retroactivity laid down by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the holding in *Bendix* should not be applied retroactively to bar the lawsuit at issue in this case, which had already been filed and was pending at the time that *Bendix* was decided. First, *Bendix* laid down a new principle of law that overruled clear past precedent on which litigants such as Respondent may have relied. Second, retrospective operation of the rule announced in *Bendix* would not further the purpose of that rule in any way. Third, the retroactive application of *Bendix* to bar this lawsuit would produce substantially inequitable results.

The Court's recent decision in *Harper v. Virginia Dep't of Taxation*, 509 U.S. ___, 113 S. Ct. 2510 (1993), did not expressly overrule the Court's earlier decision in *Chevron Oil*, which thus continues to lay down the controlling standard for determining the legal issue of retroactivity on the facts of this case. To the extent that the Court's recent decision in *Harper* may instead be construed as having overruled the *Chevron Oil* decision under all circumstances, it should be reconsidered and either modified or abandoned.

ARGUMENT

The retroactivity issue presented in this case has not been previously determined by this Court, either in *Bendix* itself or in any subsequent case. The reliance interests implicated on the facts of this case are strikingly similar to those addressed in *Chevron Oil* more than twenty years ago, and thus this case squarely raises the question whether the Court's decision in *Chevron Oil* maintains any continued vitality in light of later decisions. For all of the reasons discussed below, the amicus curiae submits that *Chevron Oil* continues to provide an appropriate rule for resolving the legitimate reliance interests involved in determining the retrospective operation of decisions governing statute-of-limitations issues. Accordingly, the Court should hold that Respondent's cause of action, which had already been filed and was pending at the time that *Bendix* was decided, should not be barred after the fact by retroactive application of *Bendix*.

I. THE COURT EXPLICITLY CONCLUDED THAT IT WAS UNABLE TO ADDRESS THE RETROACTIVITY ISSUE IN *BENDIX* BECAUSE THE ISSUE HAD NOT BEEN PROPERLY RAISED BY THE PARTIES ON THE RECORD BEFORE THE COURT, AND THEREFORE THE RETROACTIVITY ISSUE SHOULD BE DETERMINED IN THE FIRST INSTANCE IN THIS CASE.

In *Bendix* itself, the Court held that the tolling statute at issue in this case violated the Commerce Clause by imposing an impermissible burden on interstate commerce. 486 U.S. at 892-95. It then determined that it should apply that holding to the parties before the Court, and did so. *Id.* at 895. In subsequent decisions, the Court has suggested that the retroactive application of a prior decision should turn substantially, if not entirely, on whether or not the Court had applied its prior ruling to the parties before it in that particular case. See, e.g., *Harper*, 113 S. Ct. at 2517-18; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538-41 (1991) (Souter, J.) (plurality opinion).

In both *Harper* and *Beam*, however, the Court noted that the retroactivity issue would be determined differently, and presumably should be understood to have remained open, in any case where the Court indicated that it had "reserve[d] the question whether its holding should be applied to the parties before it." See *Harper*, 113 S. Ct. at 2518; *Beam*, 501 U.S. at 539. But that is exactly what the Court did in *Bendix*; it specifically held that it could not determine the retroactivity issue on the record before it because that issued

was precluded on purely procedural grounds.¹ Although the Court thus applied its holding in *Bendix* to the parties before the Court, it did so *only* because it determined that on the record of that case it was unable to consider and resolve the legal issue of retroactivity at all. Thus, the *legal issue* of whether *Bendix* should properly be applied retroactively in later cases was specifically not decided by this Court.

Where a legal question expressly is not decided by the Court because it cannot be reached on purely procedural grounds, it should not be taken as having been foreclosed when properly raised in a later case. See, e.g., *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9-12 (1991) (quoting numerous prior opinions which concluded that where the issue of the constitutionality of punitive damages had been determined to be procedurally barred, that legal issue remained open for consideration and resolution when properly raised in a subsequent case). Therefore, the retroactive application of *Bendix* should be regarded as an open question to be determined in the first instance in this case.

¹ In *Bendix*, the Court noted that the court below had "refused to consider the [retroactivity] argument because it was raised for the first time in *Bendix*'s reply brief. 820 F.2d at 189. As the argument was not presented to the courts below, it will not be considered here." 486 U.S. at 895. Thus, the Court expressly found itself unable to decide the legal issue on purely procedural grounds.

II. UNDER THE *CHEVRON OIL* TEST FOR RETROACTIVITY, THE COURT'S HOLDING IN *BENDIX* SHOULD NOT BE APPLIED RETROACTIVELY TO BAR RESPONDENT'S LAWSUIT, WHICH HAD ALREADY BEEN FILED AND WAS PENDING AT THE TIME THAT *BENDIX* WAS DECIDED.

As explained in the preceding section, the retroactivity issue presented in this case has not been previously determined by the Court, either in *Bendix* itself or in any subsequent case. The amicus curiae therefore submits that *Chevron Oil* continues to provide an appropriate rule for resolving the legitimate reliance interests involved in determining the retrospective application of decisions governing statute-of-limitations issues. See, e.g., *Beam*, 501 U.S. at 543 (Souter, J.) (plurality opinion) (suggesting that the *Chevron Oil* analysis still governs the legal issue of whether "retroactive application is chosen for any assertedly new rule"); *id.* at 545-46 (White, J., concurring) (same); *id.* at 550-559 (O'Connor, J., dissenting) (same); see also *Harper*, 113 S. Ct. at 2517 ("*Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*").² Applying the *Chevron Oil* analysis on the facts of in this case, the Court should hold that Respondent's cause of action, which had already been filed and was pending at the time that *Bendix* was decided, should not be barred after the fact by retroactive application of *Bendix*.

² This is, indeed, the very issue that the Court framed but found itself unable to address in *Bendix*: whether the ruling that the Ohio tolling statute is unconstitutional "should be applied prospectively only." 486 U.S. at 895 (citing *Chevron Oil*).

The reliance interests involved in this case are strikingly similar to those addressed in *Chevron Oil* itself. In *Chevron Oil*, as here, the plaintiff brought suit more than two years after he was injured. The injury occurred while the plaintiff was working on an oil drilling rig. At that time, the Outer Continental Shelf Lands Act, which governed such injuries, was construed to incorporate general admiralty law, including the equitable doctrine of laches. Based on its application of that approach, the appeals court in *Chevron Oil* had determined that the plaintiff's suit had been properly instituted and directed that it should proceed to trial. See *Chevron Oil*, 404 U.S. at 98-100.

Around the same time, however, the Supreme Court issued its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which held that such suits were governed by Louisiana's one-year limitations statute for personal injury actions. There was no question that the Supreme Court's decision in *Rodrigue*, which "entirely changed the complexion of [the *Chevron Oil*] case," was rendered only after the plaintiff had brought suit in *Chevron Oil*. 404 U.S. at 99. The question before the Court, therefore, was whether the *Rodrigue* decision should be applied retroactively to bar the plaintiff's lawsuit, which had already been filed and was pending at the time that *Rodrigue* was issued.

The analysis in *Chevron Oil* and in this case thus are almost exactly the same. And under the three-pronged test for determining retroactivity laid down by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the holding in *Bendix* should not be applied retroactively to bar the lawsuit at issue in this case, which had already been filed and was pending at the time that *Bendix* was decided. The *Chevron Oil* test is as follows:

First, the decision to be applied nonretroactively must establish a new principle of law ... by overruling clear past precedent on which litigants may have relied Second, [we must] weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.... Finally, ... where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

404 U.S. at 106-07 (citations and internal quotes omitted).

First, *Bendix* laid down a new principle of law that overruled clear past precedent on which litigants such as Respondent may have relied. The court below described and explained this fact perhaps most authoritatively in the following passage from its decision in this case: "In not filing her complaint against [Petitioners] until 1987, Hyde relied on Ohio's tolling statute, R.C. 2305.15, and the most recent interpretation of that statute by the court of appeals in her appellate district, *May v. Leidli* (1986), 32 Ohio App.3d 36, 513 N.E.2d 1347. No court of binding precedent in Ohio had ever ruled that R.C. 2305.15(A) was unconstitutional. Nearly one year after Hyde's complaint was filed, *Bendix* was announced." Pet. A8.

Second, retrospective operation of the rule announced in *Bendix* would not further the purpose of that rule in any way. The holding in *Bendix* was that the Ohio tolling statute imposed "an unreasonable burden on [interstate] commerce," 486 U.S. at 895, which was held not to be justified by the

state interests asserted in defense of the statute, *id.* at 894-95. Considered from another vantage point, Justice Scalia characterized the Court's approach as undertaking a judicial determination of what "real-world deterrent effect on interstate transactions will be produced by the incremental cost of having to defend a delayed suit." *Id.* at 896 (Scalia, J., concurring). From either perspective, the judgment rendered by the Court in *Bendix*, pursuant to its dormant Commerce Clause jurisprudence, was whether the Ohio tolling statute would impermissibly burden interstate commerce to such an extent as to undercut "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976).³

Once the holding in *Bendix* was announced, however, the purposes served by the Court's decision were entirely fulfilled. The offending provision was invalidated for all future situations in which commercial decisions would have to be made by out-of-state corporations considering what steps to take in the Ohio marketplace. But that ruling could not and did not affect any business decisions made by such corporations prior to the date of the *Bendix* decision. Any supposed "deterrent effect on interstate transactions" created by the Ohio tolling statute, 486 U.S. at 896 (Scalia, J., concurring), had already been felt, and could not be affected in any way by the Court's further choice of whether to apply *Bendix* prospectively or retrospectively.

³ Another common aspect of the problem posed by the dormant Commerce Clause is whether the proposed measure would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," which again is to create and maintain a common market throughout the Federal union. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

Third, the retroactive application of *Bendix* to bar this lawsuit would produce substantially inequitable results. As in *Chevron Oil* itself, "to hold that the respondent 'slept on [her] rights' at a time when [s]he could not have known the time limitation that the law imposed upon [her]" would work grave injustice in this case. 404 U.S. at 108. "Certainly, the respondent's potential redress for [her] allegedly serious injury" is "entitled to similar protection," especially where, as in this case, "nonretroactive application here simply preserves [her] right to a day in court." *Id.*

For these reasons, therefore, the retroactivity analysis laid down in *Chevron Oil* leads to the conclusion that the *Bendix* holding should not be applied retroactively on the facts of this case.

III. THE COURT'S RECENT DECISION IN *HARPER* DID NOT EXPRESSLY OVERRULE THE COURT'S EARLIER DECISION IN *CHEVRON OIL*, WHICH THUS CONTINUES TO LAY DOWN THE CONTROLLING STANDARD FOR DETERMINING THE LEGAL ISSUE OF RETROACTIVITY ON THE FACTS OF THIS CASE.

The retroactivity analysis laid down in *Chevron Oil* has received further scrutiny in several recent decisions. None of those subsequent cases, however, purports to overrule *Chevron Oil* as a general matter, and certainly no such extraordinary ruling is apparent from the explicit discussion contained in those cases. Therefore, *Chevron Oil* is properly understood as continuing to set out the retroactivity analysis that governs in those civil cases where the issue is properly before the Court for determination. And if instead the Court determines that *Chevron Oil* does not govern the retroactivity issue as a general matter in all

civil cases, then at least *Chevron Oil* should continue to apply in cases -- like this one -- which concern the potential retrospective operation of a decision that would shorten the limitations period so as to bar suits that had already been filed and were pending at the time that decision was rendered.

The legal issue of retroactive application has been considered by the Court in three recent cases, all quite distinct from *Chevron Oil* itself, which concerned state taxing schemes that were judged to violate the Commerce Clause. In *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990), four members of the Court applied the three-part *Chevron Oil* test to determine whether the recent decision in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), which invalidated state highway use equalization taxes, should be applied retroactively. *See Smith*, 496 U.S. at 178-86 (O'Connor, J.) (plurality opinion). These Justices expressly declined what they described as "a proposal that we *sub silentio* overrule *Chevron Oil*." *Id.* at 190.

Four dissenting Justices in *Smith*, by contrast, described *Chevron Oil* as a decision that did not lay down general principles of retroactivity that apply to all civil cases. Instead, these Justices understood *Chevron Oil* as establishing principles that apply only in cases where the federal courts properly exercise "equitable discretion." *Smith*, 496 U.S. at 220-222 (Stevens, J., dissenting). One such area involves "the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver." *Id.* at 221. The dissenting Justices cited two further decisions that they described as having characterized the reach of *Chevron Oil* in the same fashion, viz., as applying most directly in cases that raise limitations issues. *See id.* at 222-223; *see also Saint Francis College v. Al-Khazraji*, 481 U.S.

604, 608 (1987) (*Chevron Oil* "counsels against retroactive application of statute of limitations decisions in certain circumstances"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662-663 (1987) (same). All of these Justices thus concluded that *Chevron Oil* does and should continue to have vitality at least in this specified sphere.

In *Beam*, the Court fragmented on the issue of whether its ruling in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which struck down state laws imposing discriminatory excise taxes on imported alcoholic beverages, should apply retroactively. Justice Souter, speaking for two members of the Court, concluded that the principle of selective prospectivity should not be employed in the Court's decisions. Therefore, because the Court in *Bacchus* had applied its ruling to the parties before it without giving any indication that the legal issue of retroactivity had been reserved or otherwise could not be decided, it should be given retrospective operation in all other cases. 501 U.S. at 539 (Souter, J.) (plurality opinion). Yet Justice Souter clearly did not intend to overrule *Chevron Oil*, and indeed described the effect of his approach much more modestly, saying only that to a limited extent, "our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case." *Id.* at 543; *see also id.* at 545-46 (White, J., concurring) (declaring that the *Beam* decision did not sound a retreat from *Chevron Oil* in cases where it properly applies and noting that *Chevron Oil* had not been overruled). The three dissenting Justices, more broadly, expressed fidelity to the *Chevron Oil* retroactivity analysis in all civil cases, which they viewed as grounded in "well-settled precedent." *Id.* at 550 (O'Connor, J., dissenting).

In *Harper*, finally, the Court considered whether its decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S.

803 (1989), which held that discriminatory state taxes on Federal retirement benefits are unconstitutional, should be given retrospective application. A majority of the Court held that in any case where the legal issue of retroactivity is decided and not reserved, the holding of that case should be applied in like manner to all other parties who come before the courts. See 113 S. Ct. at 2518. The Court thus stated that it was adopting and endorsing the approach that had been articulated by Justice Souter in *Beam*. *Harper*, 113 S. Ct. at 2517-18. Nowhere in the Court's opinion did it purport to overrule *Chevron Oil* as a general matter.⁴

Justice Kennedy, in a concurrence that was joined by Justice White, stated his view that "retroactivity in civil cases continues to be governed by the standard announced in *Chevron Oil*," and distanced himself from any "broad dicta" to the contrary in the Court's opinion. *Harper*, 113 S. Ct. at 2525 (Kennedy, J., concurring). And Justice O'Connor, in a dissent joined by the Chief Justice, stated her continuing adherence to "our traditional retroactivity analysis as articulated in *Chevron Oil*," *id.* at 2526 (O'Connor, J., dissenting), and undertook such an analysis in that case, *id.* at 2631-36.

It thus appears that the Court has never overruled *Chevron Oil*, and that its three-pronged inquiry continues to govern the legal issue of retroactivity in any subsequent case where the issue has been reserved or could not be resolved in the initial decision. Even more to the point, a substantial majority of Justices appears to continue to adhere to *Chevron Oil* in cases that involve "the application of a statute of

⁴ It should be noted, again, that Justice Souter in *Beam* did not purport to overrule *Chevron Oil*, but instead described it as generally "irrelevant" to the issues raised in that case. 501 U.S. at 543 (Souter, J.) (plurality opinion).

limitations, an area over which the federal courts historically have asserted equitable discretion." *Smith*, 496 U.S. at 221 (Stevens, J., dissenting). On both of these grounds, therefore, the *Chevron Oil* analysis constitutes the proper test for determining the legal issue of retroactivity on the facts of this case.

IV. TO THE EXTENT THAT THE COURT'S RECENT DECISION IN *HARPER* MAY BE CONSTRUED AS HAVING OVERRULED *CHEVRON OIL* UNDER ALL CIRCUMSTANCES, IT SHOULD BE RECONSIDERED AND EITHER MODIFIED OR ABANDONED.

As described in the preceding section, the Court has not overruled *Chevron Oil* in any of the three cases in which the Court has more recently considered its retroactivity jurisprudence. Each of those cases, moreover, presented quite distinct issues raised by the prior invalidation of state taxing schemes. By contrast, as Justice Stevens noted in *Smith*, 496 U.S. at 222-223 (Stevens, J., dissenting), the Court has applied *Chevron Oil* with approval in two recent cases that raised limitations issues, see *Saint Francis*, 481 U.S. at 608; *Goodman*, 482 U.S. at 662-663, issues that are indistinguishable from those raised in this case. In this context, at least, *Chevron Oil* continues to frame the proper analysis of the legal issue of retroactivity.

Therefore, to the extent that *Harper* might be erroneously construed as having overruled *Chevron Oil* under all circumstances, *Harper* itself should be reconsidered and either modified or abandoned. If *Harper* were to be taken as having *sub silentio* overruled *Chevron Oil* under all circumstances, then the important doctrine of *stare decisis* would have been grossly disserved. "Considerations in favor of *stare decisis* are at their acme in cases ... where reliance

interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *see also Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2809 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.). That is plainly the case here, however, and it is also true of every case in which *Chevron Oil* applies to govern the retroactivity of a judicial decision shortening the limitations period upon which litigants have relied in filing suit. *See, e.g., Chevron Oil*, 404 U.S. at 108.

Moreover, nothing in *Harper* compels such a broad reading to be given to its "dicta." *See id.*, 113 S. Ct. at 2525 (Kennedy, J., concurring). If any such error were to be made in widening the scope of that decision, then the resulting extinguishment of legitimate vested reliance interests could well contravene the dictates of the Due Process Clause. *See, e.g., Reich v. Collins*, 63 U.S.L.W. 4032 (U.S. Dec. 6, 1994). And in that instance, the "freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once." *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting). Thus, the Court in this case should declare plainly that *Harper* is not to be construed as having overruled the retroactivity analysis of *Chevron Oil* under all circumstances and, in particular, that *Harper* does not do so on the facts of this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Respondent, the decision of the Supreme Court of Ohio should be affirmed and Respondent's pending cause of action should be permitted to proceed to trial in the state courts.

Respectfully submitted,

LEE FISHER
Attorney General of Ohio

RICHARD A. CORDRAY
State Solicitor
(Counsel of Record)
SIMON B. KARAS
Deputy Chief Counsel
State Office Tower
30 East Broad Street
17th Floor
Columbus, Ohio 43215
(614) 466-5026

COUNSEL FOR AMICUS CURIAE
STATE OF OHIO

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